BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-2-E

IN RE: Annual Review of Base Rates for Fuel Costs for South Carolina Electric & Gas Company	)	**SCE&G'S MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PETITION OF CCL AND SACE**

Pursuant to 10 S.C. Code Ann. Reg. § 103-829(A) (2012) and other applicable law, and in compliance with the Standing Hearing Officer Directive dated March 28, 2018, South Carolina Electric & Gas Company ("SCE&G" or the "Company") submits this Motion to Dismiss and Response in Opposition ("Motion to Dismiss") to the Petition for an Order Requiring SCE&G to Comply with Commission Order No. 2018-55 ("Petition") filed by the South Carolina Coastal Conservation League ("CCL") and the Southern Alliance for Clean Energy ("SACE"). For the reasons set forth herein, the Petition should be dismissed or denied. In support thereof, SCE&G would respectfully show as follows:

Background and Argument

In connection with the Company's 2016 annual fuel proceeding, Docket No. 2016-2-E, to which CCL and SACE were parties, SCE&G sought approval of Rate PR-2 that reflects SCE&G's long-run avoided cost rates to be used in conjunction with negotiating long-term contracts with qualifying cogeneration facilities. In that

proceeding, CCL and SACE, through the testimony of its witness Thomas Vitolo, recommended that the Company should update the rate schedule on an annual or semi-annual basis instead of twice a year or more often as recommended by SCE&G. Order No. 2016-297, dated April 29, 2016, issued in Docket No. 2016-2-E at 25. In approving the proposed Rate PR-2, however, the Commission agreed with the Company and determined it was reasonable for the Company to update "Rate PR-2 twice a year or more often as may be necessary." Order No. 2016-297 at 26.

On December 20, 2016, SCE&G filed its first update to the Rate PR-2 in accordance with Order No. 2016-297. By letter dated January 6, 2017, CCL and SACE opposed the update, asserting that the proposed rate "[did] not accurately reflect SCE&G's avoided costs." In resolving this matter, the parties agreed to hold in abeyance or stay the request to update the Rate PR-2 and that the Company would file a revised Rate PR-2 as part of the prefiled direct testimony of its witnesses in the Company's 2017 fuel proceeding, Docket No. 2017-2-E. The parties also agreed to maintain the then-current rate until the Commission issued its order on the subsequent updates to the Rate PR-2 as part of that matter.

In the 2017 fuel proceeding, CCL and SACE, through witness Vitolo, again recommended that the Company should update the rate schedule on an annual or biennial basis. Order No. 2017-246 at 24. Once more, the Commission agreed with the Company, however, and found that "SCE&G's proposal to update its proposed PR-2 Rate Schedule twice a year or more often as may be necessary is reasonable and consistent with Commission Order No. 2016-297." *Id*. at 25.

Following the approval of the updated Rate PR-2 in Order No. 2017-246, SCE&G encountered several issues that impacted its resource plan. Among other things, the Company added or contracted to add additional solar facilities, announced the abandonment of the two new nuclear units at V.C. Summer Station, and announced its intent to purchase a 540-MW combined-cycle, natural gas-fired power plant. *See* Order No. 2018-55, dated January 24, 2018. As a result of these developments, on December 22, 2017, SCE&G advised the Commission that it was in the process of evaluating its resource plan going forward and did not believe that it would be prudent to update its Rate PR-2 at that time. *Id.* SCE&G further informed the Commission of its plan to implement changes to certain aspects of its avoided cost calculation including the use of an intermittent, non-dispatchable source of capacity, i.e., 100 MW of solar generation, to perform its difference in revenue requirement analysis to determine the appropriate avoided capacity costs for its Rate PR-2 tariff. *Id.*

CCL and SACE opposed the request, asserting that SCE&G should be required to file its update "within … two weeks" of CCL and SACE's opposition. CCL and SACE's Response to SCE&G's Request for a Waiver of Commission Order 2017-247, dated January 16, 2018, at 5. In the alternative, however, CCL and SACE requested that "should the Commission deem SCE&G's waiver request to be reasonable, then at the very least the utility must file its six month update on February 23, 2018, the date by which it is required to file its testimony in the 2018 fuel cost docket." *Id.* Furthermore, they stated that "[t]his filing should be based on

the prior approved methodology" and that it "should be treated the same as the six month update, and should go into effect *as soon as possible* and prior to the resolution of the 2018 proceeding, so that rate payers have the immediate benefit of updated rates based on an approved methodology." *Id.* (Emphasis in original).

In other words, CCL and SACE asked the Commission to require SCE&G to file its updated Rate PR-2 no later than January 30, 2018 – two weeks after the filing date of their opposition. Alternatively, CCL and SACE requested that the updated Rate PR-2 be filed no later than February 23, 2018, and that the rates then be made immediately effective.

On January 24, 2018, the Commission ruled on SCE&G's request finding that "[c]urrent uncertainties with SCE&G make it appropriate to address [the Rate PR-2] **in the context of the fuel case in April**." Order No. 2018-55 (emphasis added). The Commission also recognized that the Company "is planning to implement changes to certain aspects of its avoided cost calculation" and concluded that SCE&G should be required "to put **that proposed rate** in its prefiled testimony." *Id.* (Emphasis added). Notably, however, the Commission did not grant CCL and SACE's request that SCE&G be required to update its Rate PR-2 based on the prior approved methodology or that it go into effect as soon as possible. Rather, Order No. 2018-55 makes plain the Commission's decision that issues regarding updates to Rate PR-2 should be addressed and decided "in the fuel case" on the basis that it would "promote[] judicial economy and allow[] the issue to be addressed expeditiously." *Id.*

On February 23, 2018, SCE&G prefiled direct testimony of its witnesses in Docket No. 2018-2-E including the direct testimony of Joseph M. Lynch. Among other things, Dr. Lynch's testimony set forth Rate PR-2 proposed by SCE&G, which reflected the changes identified in the Company's December 22, 2017 filing.

Accordingly, SCE&G fully complied with the Commission's directives set forth in Order No. 2018-55. For the reasons identified in its December 22, 2017 filing and its prefiled direct testimony, the Company believed the Rate PR-2 based upon the previously approved methodology did not properly reflect SCE&G's avoided costs and therefore did not propose that rate in Docket No. 2018-2-E. Instead, the Company set forth its proposed Rate PR-2 and the underlying changes giving rise to the updated rate in prefiled direct testimony, all in compliance with Order No. 2018-55. Furthermore, the Company did not identify a Rate PR-2 based upon the prior methodology because Order No. 2018-55 did not require it to do so.

CCL and SACE's Petition therefore is without any merit and is legally insufficient and so deficiently drawn that it fails to support CCL and SACE's request. Order No. 2018-55 required SCE&G to simply include its "proposed" Rate PR-2 in its testimony, which it did. Nowhere in the Order does it require the Company to include the rate that CCL and SACE wish that the Company would propose or to identify what the rate would have been under the prior methodology.[1]

[1] The Company further notes that CCL and SACE availed themselves of the right to seek this information in discovery. Specifically, CCL and SACE requested in their first data request to SCE&G in Docket No. 2018-2-E that the Company provide the four avoided energy costs for PR-2 under the methodology approved in Docket No. 2017-2-E and other information related to SCE&G's calculated avoided capacity costs. The Company produced

If that is the relief CCL and SACE demanded, they could have petitioned the Commission to reconsider its decision in Order No. 2018-55. They failed to do so and, as such, are now collaterally estopped from seeking in its Petition the same relief which the Commission previously declined to grant. *See* S.C. Code Ann. § 58-27-2310 ("No right of appeal accrues to vacate or set aside, either in whole or in part, an order of the commission, except an order on a rehearing, unless a petition to the commission for a rehearing is filed and refused or considered refused because of the commission's failure to act within twenty days."); *Bennett v. South Carolina Dep't of Corrections*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("This Court has repeatedly held that under the doctrines of *res judicata* and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.").

Moreover, the Petition and corresponding relief sought by CCL and SACE is nonsensical. Through its December 22, 2017 request, SCE&G sought a waiver of its obligation to file a six-month update to Rate PR-2. The Commission granted that request in Order No. 2018-55 and required SCE&G to file its "proposed rate" as part of the Company's prefiled direct testimony in Docket 2018-2-E, thus "allowing this issue to be addressed in the fuel case." Order No. 2018-55. Even so, CCL and SACE

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the requested information on March 16, 2018. Accordingly, CCL and SACE had the information and the ability to propose alternative rates in their direct testimony, which they prefiled in Docket No. 2018-2-E on March 23, 2018. They chose not to do so. Instead, they merely complain that SCE&G did not file a rate under the previously approved methodology. For the reasons set forth in the prefiled direct testimony of Dr. Lynch, however, SCE&G did not "propose" these avoided cost rates because the Company believes that the previously approved methodology is no longer appropriate and that changes to the methodology are warranted and needed.

now argue that SCE&G was required "to file its tariff update on February 23, 2018." Petition at 4. CCL and SACE therefore suggest that, even though the Commission specifically granted SCE&G's request for a waiver of the requirement that it file a six-month update to Rate PR-2 and that it be allowed to update the rate in the next fuel case, the Company remained obligated to update Rate PR-2 and have it become effective on February 23, 2018. It simply is illogical to interpret Order No. 2018-55 as approving the requested waiver but also requiring the Company to perform an act for which the waiver was explicitly granted. Consequently, the relief sought by CCL and SACE would render the Commission's Order meaningless and, consequently, should be denied.

For these reasons, the Petition should be dismissed for failing to state a claim upon which relief can be granted because CCL and SACE cannot prevail on any legal theory. A defendant may move for dismissal when the plaintiff does not allege facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). If the plaintiff is not entitled to relief, then it is proper to dismiss the case. *Spence v. Spence*, 368 S.C. 106, 122, 628 S.E.2d 869, 877 (2006). At bottom, CCL and SACE have not presented any facts sufficient to advance a claim that SCE&G failed to comply with the requirements of Order No. 2018-55. To the contrary, the Company presented its proposed Rate PR-2 in its prefiled direct testimony and identified the basis for the changes in the previously approved methodology, all as contemplated by Order No. 2018-55. CCL and SACE's Petition

therefore should be dismissed as the requested relief is neither warranted by the facts alleged nor required by a prior Commission order or otherwise.

Conclusion

For the foregoing reasons, SCE&G respectfully requests that the Petition be denied or dismissed as it fails to state a claim upon which relief may be granted, and for such other and further relief as is just and proper.

Respectfully submitted,

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